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Supreme Court, U.S.
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No. 04-207

IN THE
SUPREME COURT OF THE UNITED STATES

BETH LEWIS,

PETITIONER,

-v-

STATE OF OHIO,

RESPONDENT.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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LIST OF PARTIES

Petitioner is attorney Beth Lewis.

Respondent is the State of Ohio.

In the proceedings below, John Doe, an unidentified person investigated by the Montgomery County Grand Jury, was also listed as a party.

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REASONS FOR GRANTING THE WRIT

Respondent argues that review should be denied for three reasons. They are addressed below in the order presented by Respondent.

A. THIS CASE IS PROPERLY BEFORE THE COURT

Respondent argues that presentation of the federal constitutional claims to the Ohio Supreme Court in a Motion for Reconsideration is inadequate to allow review by this Court. Rule XI of the Ohio Supreme Court Rules of Practice is designed to allow the court to re-evaluate decisions specifically because not all pertinent claims or arguments were made. The rule requires that new grounds for reviewing its decision be presented to the court. It prohibits re-argument of the case.

Respondent's view that use of this procedure was an inadequate vehicle by which to press her claims is in error. Rule XI of the Ohio Supreme Court Rules of Practice meets all of the requirements of federalism and comity. It allows the highest court in the state to review the issue; to send it back to the lower courts for further proceedings; to alter a previous decision; or to issue a new one.

The Ohio Supreme Court denied Petitioner's motion for reconsideration more than two months after it was filed. The matter was not dismissed. It was denied. A denial is a decision on the merits determining that the factors raised do not require the court to revise its earlier decision and thus is a final judgment by the highest court of the state within the meaning of 28 U.S.C. §1257. This matter is properly before this Court.

When a Motion for Reconsideration is filed pursuant to Ohio Supreme Court Rule of Practice XI, the Ohio Supreme Court's mandate does not issue. Its opinion does not become final until the motion for reconsideration

has been addressed. This is apparent from the rule itself but is explained in Justice Holmes' dissent in ***City of Rocky River v. State Employment Relations Board***, 41 Ohio St.3d 602 (1989). He noted (discussing an earlier version of the reconsideration rule), "A case has always been considered and declared final upon the denial of the motion for rehearing and issuance of our mandate." *Id.* at 607.

Although raising the federal constitutional issues in a motion for reconsideration before the Ohio Supreme Court is by itself sufficient to allow review, counsel for Attorney Lewis did alert the lower courts to the federal constitutional ramifications of interpreting Ohio's attorney-client privilege statute to allow posthumous third party waiver of the privilege. In the Montgomery County Court of Common Pleas, her lawyer said, "I guess I have already touched upon what I feel are the state and federal Constitutions, as to right of access to counsel, as to due process. That would be implicated by a different interpretation of the statute." ***State v. Doe***, Case No. 2002-CR-1975, Montgomery County Court of Common Pleas, Hearing Transcript June 25-26, 2002, p. 51. The court held, "You indicated that there was a constitutional issue. I don't think that the constitutional issue that you referred to in the Federal case is applicable to this situation." *Id.* at p.65.

In the Montgomery County Court of Appeals and her initial appeal to the Ohio Supreme Court, Attorney Lewis told the courts that violation of the privilege "will severely stifle and undermine the full and frank communications between attorney and client that are critical to the fair and effective representation of all clients." Montgomery County Court of Appeals Brief, p. 4; Ohio Sp. Ct. Brief, p. 16. Ohio interprets its guarantee of effective assistance of counsel to be the same standard as the Sixth Amendment. ***State v. Williams***, 99 Ohio St.3d 493, 508, 794 N.E.2d 27, 46 (2003), ***State v. Bradley***, 42

Ohio St. 3d 136, 142, 538 N.E.2d 373, 379 (1989). When Petitioner told the courts that posthumous third-party waiver would negatively impact the ability to provide effective assistance, she alerted them to the federal issue.

In addition, *amici curiae* in the Ohio Supreme Court cited the guarantees of the Fifth, Sixth and Fourteenth Amendments as grounds for denying infringement of the attorney client privilege by permitting third-party posthumous waiver. Merit Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, Ohio Association of Criminal Defense Lawyers, Maumee Valley Criminal Defense Lawyers Association, and Greater Cincinnati Criminal Defense Lawyers Association, p. 4.

Throughout the state court proceedings, this case was viewed by all as one of statutory interpretation. The Ohio courts all sought to identify the legislative intent of the statute and that was the primary focus of briefing. Even so, all were informed that an interpretation that invaded the attorney-client privilege would run afoul of the federal constitution. When the Ohio Supreme Court held that the attorney-client privilege could be waived posthumously by third parties, outside the scope of the widely recognized testamentary exception, Attorney Lewis sought reconsideration focusing on the federal constitutional violations the new holding allowed.

The questions before this Court were properly presented below. The principles of comity and federalism have been protected. There is no bar to jurisdiction in this Court.

B. ONGOING CONTEMPT PROCEEDINGS MAKE THIS A LIVE CONTROVERSY

Respondent asserts that because Ms. Franks, Attorney Lewis's client, is dead there is no case or controversy. To the contrary, Attorney Lewis as Ms. Franks' counsel is

under a continuing legal obligation to protect privileged communications and faces imprisonment for contempt in this matter. Furthermore, the chilling effect of the Ohio Supreme Court's ruling on all future attorney-client relationships makes this a matter of great public interest and importance.

C. THE CONSEQUENCES OF THE OHIO SUPREME COURT DECISION ARE FAR REACHING

Respondent argues that because the statute at issue is enforced only in Ohio, its effect is not broad enough to warrant this Court's attention. In fact the ramifications of this statute are broad. It affects every person who may be involved in litigation in Ohio. The statute does not limit its reach to those who sought counsel in Ohio. Every attorney-client relationship is at risk, regardless of where formed, if counsel is called to testify in Ohio.

CONCLUSION

For all of the reasons stated above and in Attorney Lewis's Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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